Supreme Court, U.S.
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93-897

No. 93-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term of 1993

CONCORDIA COLLEGE CORPORATION,

Petitioner,

V.

W.R. GRACE & CO., W.R. GRACE & CO.-CONN.; UNITED STATES GYPSUM COMPANY; KEENE CORPORATION; PFIZER, INC.; AND BASIC, INC.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DANIEL A. SPEIGHTS
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QUESTIONS PRESENTED FOR REVIEW

1. Is the tolling doctrine established in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974) limited by the specificity of the time limit sought to be tolled, or does tolling apply to "specific" deadlines such as the ninety day time limit tolled in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983) or the one year time limit tolled in *American Pipe & Construction Co.?*

2. In a federal diversity action, is class action tolling limited by a state law distinction between "substantive" and "procedural" time deadlines, or is the federal interest identified in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974) sufficiently strong to justify tolling regardless of state law?

3. May a putative plaintiff in a diversity based class action be deprived of the protection granted by a state statute which extends and revives the time to bring the action simply because the plaintiff later filed a separate action, or does *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983) and *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) forbid such discrimination?

4. When a motion to vacate a summary judgment is made under Rule 59(e) of the Federal Rules of Civil Procedure, is a District Court's discretion limited by the "newly discovered evidence" requirement in Rule 60(b)(2), or does the District Court have the power to consider all the evidence presented?

LIST OF PARTIES TO THE PROCEEDING BELOW

PETITIONER: Concordia College Corporation, a non-profit organization (no parent or subsidiary).

RESPONDENTS:

1) W.R. Grace & Co., individually and as successor-in-interest to the Zonolite Companies and Western Mineral Products Company (no parent or partially owned subsidiary);

2) W.R. Grace & Co. - Conn., individually and as successor-in-interest to the Zonolite Companies and Western Mineral Products Company (W.R. Grace & Co. is parent; no partially owned subsidiary);

3) United States Gypsum Company (a wholly owned subsidiary of USG Corporation);

4) Keene Corporation, individually and as successor-in-interest to the Ehert Magnesia Manufacturing Company, Baldwin-Hill Company, Baldwin-Ehert-Hill, -Inc., Mundet Company, and Keene Building Products Corporation (no parent or partially owned subsidiary);

5) Pfizer, Inc., individually and as successor-ininterest to Charles Pfizer & Company, Kelly Island Lime & Transport Company, Gibsonburg Lime Products Company, and Basic, Inc. (no parent or partially owned subsidiary);

6) Basic, Inc. (no parent or partially owned subsidiary) .

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OPINIONS DELIVERED IN THE CASE

The denial of the petition for rehearing appears at page 1 of the Appendix ("A-1"); the judgment sought to be reviewed is published as *Concordia College Corporation v. W.R. Grace & Co.*, 999 F.2d 326 (8th Cir. 1993) and begins at A-2; the District Court Order granting summary judgment begins at A-13; and the District Court Order denying the Rule 59(e) motion to vacate the summary judgment begins at A-17.

JURISDICTIONAL STATEMENT

The judgment was entered on July 14, 1993 [A-3] and the denial of the petition for a rehearing was entered on September 2, 1993 [A-1]. This Petition was filed within ninety days from the date of the denial of the petition for a panel rehearing. Jurisdiction is proper under 28 U.S.C. Section 1254(1).

THE RULES AND STATUTES INVOLVED IN THE CASE

Rule 59(e) of the Federal Rules of Civil Procedure provides:

> A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 60 (b) (2) of the Federal Rules of Civil Procedure provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:... (2) **newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b) . . ..** (emphasis added].

Minn.Stat. Section 541.051(l)(a) (1986) provides:

> **Except where fraud is involved,** no action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of the injury, shall be brought against any person performing or furnishing the design, planning, supervision,

materials, or observation of construction or construction or the improvement to real property or against the owner of the real property more than two years after discovery of the injury or, in the case of an action for contribution or indemnity, accrual of the cause of action, **nor, in any event shall such a cause of action accrue more than ten years after substantial completion of the construction . . ..**[emphasis added].

Minn.Stat. Section 541.22(2) (1987) provides:
Notwithstanding any other law to the contrary, an action against a manufacturer or supplier of asbestos or material containing asbestos to recover for (1) removal of asbestos or material containing asbestos from a building, (2) other measures taken to locate, correct, or ameliorate any problem related to asbestos in a building, or (3) reimbursement for removal, correction, or amelioration of an asbestos problem that would otherwise be barred before July 1, 1990, as a result of expiration of the applicable period of limitation, is revived or extended. **An asbestos action revived or extended under this subdivision may be begun before July 1, 1990** [emphasis added].

STATEMENT OF THE CASE

On July 17, 1987, a diversity based class action for asbestos property damage was filed on behalf of this nation's colleges and universities in the United States District Court for the District of South Carolina. Defendants named in the action include W.R. Grace & Co., United States Gypsum Co., Keene Corporation, Basic, Inc., and Pfizer Inc.. On September 4, 1992, the Court conditionally granted the December 27, 1988 motion to certify the class. The Fourth Circuit Court of Appeals affirmed the certification on September 24, 1993. *Central Wesleyan College v. W.R. Grace & Co.*, 143 F.R.D. 628 (D.S.C. 1992), aff'd 1993 W.L. 374024 (4th Cir. Sept. 24, 1993).

After the motion for certification had been pending in *Central Wesleyan* for a year and a half, Concordia College Corporation ("Concordia") filed a diversity action for asbestos property damage in

the United States District Court for the District of Minnesota on June 29, 1990 [A-4]. Defendants named in the action included the foregoing defendants named in *Central Wesleyan:* W.R. Grace & Co., United States Gypsum Co., Keene Corporation, Basic, Inc., and Pfizer Inc. [A-3]. These five defendants jointly moved for. summary judgment based on a state repose provision found in Minn.Stat. Ann. 541.051 (1) (a). This provision provides that - except where fraud is involved - actions arising out of a defective and unsafe condition of an improvement to real property shall not accrue more than ten years after construction is substantially complete [A-4]. The buildings Concordia alleged were damaged were substantially complete by 1970 [A-5].

At the motion's hearing, Concordia's counsel focused on the impact of the *Central Wesleyan* filing on Minn.Stat. 541.22(2), a statute which revived and extended the time to bring asbestos property damage actions until July 1, 1990 [A-4]. Concordia noted that the Defendants' joint memoranda never argued that class action tolling was inapplicable *per se,* and argued that the class action tolled the revival statute's deadline for Concordia's separate action or, alternatively, that the 1987 filing itself met the deadline (A 21-23). Near the end of the hearing, one of the defendants broke with the others to argue that tolling was inapplicable *per se.* Concordia immediately raised the Defendants' fraud, noting that their fraud would have been raised earlier had any of the Defendants earlier taken that position against tolling [A-22].

The District Court held that record open for a week, but did not give Concordia an opportunity to present its fraud evidence; the Court instead directed Concordia to limit itself to a letter comment discussing the case law the Defendants first raised at the hearing [A-23]. In its letter comment, Concordia again asked the Court for an opportunity to present its fraud evidence [A-18]. [1]

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[1]The District Court noted this request in its Order denying the Rule 59(e) motion, but discounted it because it believed the state's two-year statute of limitations was clearly before the Court [A-18]. At the hearing, however, Concordia's counsel argued that the two-year provision was not properly before the Court because it was not timely raised [A-21]. The Order granting summary judgment did not rely on the two-year provision or rule on whether it was properly presented [A 13-16].

The District Court granted summary judgment based on the ten-year repose provision [A 13-16]. The Order held that *Central Wesleyan* did not toll the revival statute's deadline for Concordia's separate action, but did not address whether the 1987 filing itself met the deadline [A-16]. The Order also noted that fraud tolls the repose provision,[2] but incorrectly stated that Concordia never raised the issue [A-15].

Concordia timely filed a Rule 59(e) motion to vacate the judgment and, with the motion, presented fraud evidence against four of the six defendants [A 17-19].[3] The Court declined to reconsider the impact of *Central Wesleyan* on the revival statute [A-19]. The Court also confirmed that Concordia had indeed twice raised the fraud issue before summary judgment was rendered [A-18], but held that the law prohibited it from looking at the evidence: "If the proffered evidence was available before the disposition of the motion for summary judgment, then as a matter of law, the movant is not entitled to reconsideration based upon that evidence" [A-18].

Concordia timely filed a Notice of Appeal. The Eighth Circuit rejected the District Court's analysis of the revival statute, but held that tolling was inapplicable because the deadline's specific date creates a substantive right under state law [A 11-12]; that the *Central Wesleyan* filing protected the plaintiffs in the class, but that Concordia lost this protection by bringing a separate action [A 9-10]; and that a Rule 59(e) motion could not be used to introduce new evidence that

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[2]On a related appeal, the same panel that rendered the decision below held that common law fraud tolls the ten-year repose provision. *Metropolitan Federal Bank v. W.R. Grace & Co.*, 999 F.2d 1257, 1260-61 (8th Cir. 1993)(Minn. law).

[3]Evidence was presented against W.R. Grace & Co., W.R. Grace & Co.-Conn., United States Gypsum Co., and Keene corporation. *See Independent School District No. 197 v. W.R. Grace & Co.*, 752 F.Supp. 286, 290-291 (D.Minn. 1990)(finding genuine issue of material fact on fraud); *Kansas City v. Keene Corp.*, 855 S.W.2d 360, 368-370 (Mo. banc. 1993)(same); *Rowan County Board of Education v. U.S. Gypsum Co.*, 332 N.C. 1, 418 S.E.2d 648, 658-661 (1992) (same). *See also City of Greenville v. W.R. Grace & Co.*, 827 F.2d 975 (4th Cir. 1987)(affirming punitive damages verdict); *Hebron Public School District No. 13 v. U.S. Gypsum Co.*, 953 F.2d 398 (8th Cir. 1992)(same); *Independent School District No. 622 v. Keene Corp.*, 495 N.W.2d 244 (Minn.App. 1993) (same) , *review granted* Apr. 20, 1993.

could have been adduced during the pendency of the summary judgment motion [A-7]. [4]

The Court denied Concordia's Petition for a panel rehearing and rehearing en *banc* on September 2, 1993 [A-1].

REASONS FOR GRANTING THE WRIT

I. THE DECISION THAT CLASS ACTION TOLLING IS INAPPLICABLE WHEN THE TIME LIMIT IS "SPECIFIC" IS IN TENSION WITH DECISIONS FROM THIS COURT.

The Eighth Circuit held that class action tolling did not apply because a substantive right was created by the specificity of the revival statute's deadline [A-13]. But the statute tolled in *Crown, Cork & Seal Co.* was the ninety day time limit on bringing an action after the EEOC issues a right to sue letter, *Crown, Cork & Seal Co.*, 462 U.S. at 348, and the statute tolled in *American Pipe* was the one year time limit on bringing private antitrust actions after a governmental antitrust action ends. *American Pipe*, 414 U.S. at 541-42. These deadlines are just as specific.

The Eighth Circuit's characterization of Minnesota law also conflicts with *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945). In *Donaldson*, this Court construed another Minnesota statute which is strikingly similar to the statute at issue here: like Minn.Stat. 541.22(2), the statute revived and extended the time to bring an action and set a specific deadline for the statute's protection (one year from the statute's enactment). Id. at 306-308 and n. 3. Upholding the statute's constitutionality, this Court held that the revival statute "go[es] to matters of remedy, not to destruction of fundamental rights." Id. at 314. Under Donaldson, Concordia always had the substantive right to bring its action. Because the revival statute at issue here only effects the availability of a remedy, it is indistinguishable from the time limits tolled in *Crown, Cork & Seal Co.* and in *American Pipe*.

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[4]The Eighth Circuit incorrectly stated that the District Court did not consider the fraud issue because it was not raised in response to the summary judgment motion [A-6]. The Order denying the Rule 59(e) motion confirmed that Concordia twice raised the fraud issue before the judgment was rendered [A-18]: the District Court did not consider the issue because it believed it lacked the power to consider the evidence [A-18].

II. THE FEDERAL INTEREST IDENTIFIED IN *AMERICAN PIPE* IS SUFFICIENTLY STRONG TO JUSTIFY TOLLING REGARDLESS OF HOW STATE LAW CHARACTERIZES THE DEADLINE SOUGHT TO BE TOLLED.

The Eighth Circuit's reliance on state law to hold that tolling was inapplicable failed to consider any of the federal interests identified in *American Pipe* [A 11-12]. A different panel of the Eighth Circuit more recently held that the federal interest in ensuring efficiency and economy in class action procedures is "sufficiently strong to justify tolling in a diversity case when the state law provides no relief." *Adams Public School District v. Asbestos Corporation, Ltd.*, 1993 W.L. 406400 (8th Cir. Oct. 13, 1993).

The federal interest in a unified treatment of asbestos actions is well documented. Citing extensively from a report by Chief Justice Rehnquist's "Judicial Conference Ad Hoc Committee on Asbestos Litigation," the judicial panel on multi-district litigation recently concluded that asbestos litigation requires a new, streamlined approach. *In re Asbestos Products Liability Litigation*, 771 F.Supp. 415, 418-419 (Jud.Pan.Mult.Dist.Lit. 1991).

Asbestos class actions provide needed relief, and *Central Wesleyan* is not the only certified class action for asbestos property damage. *In re Asbestos School Litigation*, 789 F.2d 996, 1101 (3d Cir), cert. denied 479 U.S. 852 & 915 (1986) also affirmed the certification of an asbestos property damage action brought by this nation's elementary and secondary schools, public and private. These classes were only conditionally certified, however, and both Courts emphasized that the classes could always be decertified if the District Courts later determine they are unmanageable.

If these classes are ever decertified[5] and this Court denies review, no Minnesota school, college, or university, public or private,

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[5]Attempts to decertify the schools' class include *In re Asbestos School Litigation*, 977 F.2d 764, 979-98 (3d Cir. 1992) and *In re Asbestos School Litigation*, 921 F.2d 1338 (3d Cir. 1990).

can gain the revival statute's protection against the state's ten-year repose provision:[6] separate actions can not now be brought before July 1990 and, under the Eighth Circuit's decision, the class action filings do not toll this deadline.

Other states' schools, colleges, and universities are also at stake. If the decision is allowed to stand, class plaintiffs who face similar revival statutes with internal deadlines[7] "have every incentive to file a separate action," resulting in a "needless multiplicity of actions — precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of American Pipe were designed to avoid." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350-351 (1983).

Under *Hanna v. Plumer*, 380 U.S. 460 (1965), this federal interest is strong enough to justify tolling regardless of how state law characterizes the deadline sought to be tolled.

III. THE DISCRIMINATION AGAINST PUTATIVE CLASS MEMBERS WHO FILE INDEPENDENT ACTIONS IS IN TENSION WITH DECISIONS FROM THIS COURT.

The Eighth Circuit held that the *Central Wesleyan* filing satisfied the revival statute's requirements for members of the now existent class, but that Concordia lost that protection when it filed a separate action [A-10]. This discrimination is in tension with *Crown, Cork & Seal Co.* and *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1973).

Citing *Eisen*, this Court in *Crown Cork & Seal Co.* refused to discriminate between those who intervene in class actions and those who file separate suits. After the Court noted that there are many reasons why a class member would favor an individual action, such as an inconvenient class forum or the loss of control over the litigation, the decision emphasized that tolling was necessary to allow class members to rely on the class to protect their rights and that tolling was not inconsistent with statutes of limitation because the class action

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[6]The Environmental Protection Agency banned the application of sprayed-on insulation and fireproofing containing more than 1% asbestos in 1973. 38 Fed.Reg. Section 61.22(e)(April 6, 1973).

[7]*See Adams Public School District* (citing 1993 N.D. Laws 323 which provides that certain asbestos property damage actions may be brought until August 1, 1997).

eliminates the potential of unfair surprise by putting defendants on notice of the adverse claims. *Crown, Cork & Seal Co.*, 462 U.S. at 350-352.

This anti-discrimination policy is even more pronounced where a revival statute is at stake: the emphasis on enabling class members to rely on the class to protect them from a time bar is at least as strong when a statute lifting a time bar is at stake, and the emphasis that class actions eliminate surprise applies with much greater strength where a revival statute is involved. Under the revival statute, the defendants were not entitled to notice of the claims against them until July 1, 1990. The 1987 *Central Wesleyan* filing put the defendants on full notice of Concordia's adverse claims three years before.

IV. THE CIRCUIT COURTS ARE SPLIT ON WHETHER THE "NEWLY DISCOVERED EVIDENCE" REQUIREMENT OF RULE 60(b)(2) SHOULD BE READ INTO RULE 59(e) MOTIONS TO VACATE.

The Eighth Circuit held that a Rule 59(e) motion cannot be used to present evidence that is not newly discovered [A-7]. This Court recently denied certiorari to review the directly conflicting decision in *Lavespere v. Niagara Machine & Tool Works, Inc.* , 910 F. 2d 167 (5th Cir. 1990) , cert. denied 114 S.Ct. 171 (1993).

Because the Federal Rules of Civil Procedure lack a formal "motion to reconsider" and vacate a judgment, *Needham v. White Laboratories, Inc.*, 454 U.S. 927 at n. 1 (1981) (Rehnquist, J., dissenting from the denial of certiorari), Rule 59(e) motions to alter or amend a judgment and Rule 60(b) motions for relief from a judgment have been pressed into service. *See White v. New Hampshire Dept. of Employment Security,* 455 U.S. 445, 451 (1982) (Rule 59(e) will support reconsideration of matters properly encompassed in a decision on the merits) ; *Backlund v. Barnhart,* 778 F. 2d 1386, 1388 (9th Cir. 1985) (motion for reconsideration of summary judgment made be made under either Rule 59 (e) or Rule 60(b)). The lack of a formal rule has, however, caused confusion about whether Rule 59(e) is governed by Rule 60(b) standards.

Some Circuits view all "motions to reconsider" as one and - "without any textual analysis" - apply Rule 60 (b) (2)'s "newly discovered evidence" requirement to motions made under Rule 59(e) . The decision below, for example, cited *Hagman v. Yukon Energy*

Corp., 839 F.2d 407, 414 (8th Cir. 1988) to hold that Rule 59(e) motions can not be used to introduce new evidence that could have been adduced during pendency of the summary judgment [A-8]. *Hagman*, a Rule 59(e) case, cited *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir.), *as amended* 835 F.2d 710 (7th Cir. 1987) for this rule. *Rothwell* is a Rule 60(b)(2) case. *Rothwell*, 827 F.2d at 251. Other Circuits have done the same. [8]

In contrast, the Eighth Circuit's earlier decision in *Kort v. Western Surety Co.*, 705 F.2d 278, 280-81 (8th Cir. 1983) upheld the District Court's decision to rescind a summary judgment based on evidence first presented in a Rule 59 (e) motion, and *General Office Products Corp. v. A.M. Capen's Sons, Inc.*, 780 F.2d 1077, 1080 (1st Cir. 1986) similarly reversed a summary judgment based on answers and interrogatories first presented in a Rule 59(e) motion.

Lavespere v. Niagara Machine & Tool Works, Inc., 910 F.2d 167 (5th Cir. 1990), cert. denied 114 S.Ct. 171 (1993) is apparently the only decision to address this issue with a textual analysis. After noting that 60(b) contains substantive standards not found in Rule 59(e), the Court concluded that it could not "discern any basis for engrafting the strict limitations of the former onto the latter." Id. at 173. The Court held that District Courts have the power to strike the balance between "the need to bring litigation to an end and the need to render just decisions on the basis of all the facts" in favor of rendering just decisions based on all the facts. Id. at 173-174. The Court also made it abundantly clear this is a matter of discretion: the decision emphasized that a District Court **may** reopen the case based on new evidence presented under Rule 59 (e) , not that it **should** or **must** do so. Id. at 175 (emphasis in original).

Certiorari is necessary to resolve this Circuit conflict and to remind the lower courts that the "task is to apply the text [of Rule 59 (e)], not improve upon it." *Pavelic & Leflore v. Marvel Group*, 493 U.S. 120, 126 (1989).

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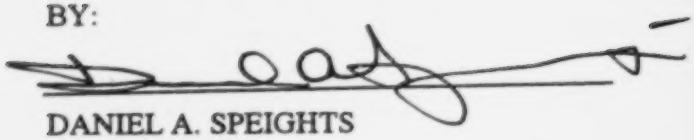
[8]For example, *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1523 (10th Cir. 1992) cited *Chery v. Bowman*, 901 F.2d 1053, 1057-58 n. 6 (11th Cir. 1990) to hold that evidence presented on a Rule 59(e) motion must be newly discovered. *Chery* cited *Taylor v. Texgas Corp.*, 831 F.2d 255, 259 (11th Cir. 1987) for the rule. *Taylor* is a Rule 60(b) (2) case. *Taylor* 831 F.2d at 259-260.

Respectfully submitted,

BY:



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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 92-1307MNST

Concordia College Corporation, etc.,	*	
	*	
Appellant,	*	Order Denying
	*	Petition for
vs.	*	Rehearing and
	*	Suggestion for
W.R. Grace & Co., etc., at al,	*	Rehearing En Banc
	*	
Appellee.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

September 2, 1993

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 92-1307

Concordia College Corporation, a non-profit organization,	*	
Appellant,	*	
v.	*	
W.R. Grace & Co., individually and as successor-in-interest to the Zonolite Companies and Western Mineral Products Company; W.R. Grace & Co —Conn., individually and as successor-in-interest to the Zonolite Companies and Western Mineral Products Company; Carey- Canada, Inc.; Basic, Inc.; The Celotex Corp., individually and as successor-in-interest to Philip Carey Manufacturing Company, Philip Carey Corporation, Briggs Manufacturing Company and Panacon Corporation; Keene Corporation, Minnesota. individually and as successor-in-interest to the Ehret Magnesia Manufacturing Company, Baldwin-Hill Company, Baldwin-Ehret-Hill, Inc., Mundet Company, and Keene Building Products Corporation; National	*	Appeal from the United States District Court for the Districtof Minnesota.

Gypsum Company, individually *
and as successor-in-interest to *
Gold Bond Building Products *
Corporation; Pfizer, Inc., *
individually and as successor-in *
-interest to Charles Pfizer & *
Company, Kelley Island *
Lime & Transport Company, *
Gibsonburg Lime Products *
Company and Basic, Inc.; *
United States Gypsum *
Company, *
*
Appellees. *

Submitted: February 19, 1993

Filed: July 14, 1993

Before BOWMAN, WOLLMAN, and HANSEN, Circuit Judges.

BOWMAN, Circuit Judge.

This is an appeal from summary judgment in favor of W.R. Grace & Company; W.R. Grace & Company—Connecticut; Carey-Canada, Inc.; Basic, Inc.; Celotex Corporation; Keene Corporation; National Gypsum Company; Pfizer, Inc.; and United States Gypsum Company (collectively W.R. Grace[1]), all manufacturers of asbestos-containing building materials, on the claim of Concordia College Corporation for recovery of its abatement costs in removing asbestos from its buildings. We affirm.

Two Minnesota statutes are especially relevant here, and we begin by identifying them and their applicability to this case. The first

[1]W.R. Grace's counsel represented all appellees at oral argument before this Court. For that reason, for simplicity in this opinion, and because W.R. Grace is the first appellee listed on the docket, we will refer to all appellees collectively as W.R. Grace.

is the statute of limitations and repose for actions arising out of construction to improve real property, and reads in pertinent part as follows:

> Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, . . . arising out of the defective and unsafe condition of an improvement to real property, . . . shall be brought against any person . . . furnishing the . . . materials . . . more than two years after discovery of the injury . . . nor, in any event shall such a cause of action accrue more than ten years after substantial completion of the construction.

Minn. Stat. § 541.051(l) (a) (1992). The "repose" aspect of the statute prohibits accrual of any cause of action after ten years. Thus regardless of when the injury is discovered, that is, when the cause accrues, see id. § 541.051(b), the cause will be deemed accrued no later than ten years after substantial completion of the construction (absent a showing of fraud).

The other statute that is critical to the resolution of this case is a "revival" statute for asbestos cases, enacted in 1987. Under the statute, an asbestos abatement recovery action "that would otherwise be barred before July 1, 1990, as a result of expiration of the applicable period of limitation, is revived or extended. An asbestos action revived or extended under this subdivision may be begun before July 1, 1990." Id. § 541.22(2) (1992).

Concordia filed suit under the District Court's[2] diversity jurisdiction on June 29, 1990, but the defendants in the suit were not served until July 24, 1990. The District Court granted summary judgment for the defendants, holding that Concordia's suit was barred by the statute of repose, and was not revived under section 541.22 because it was not "begun before July 1, 1990." Concordia contends that the statute of repose did not operate to bar its claim in this case and, should this Court find otherwise, that the revival statute operated to restore the action. We disagree with both propositions and affirm the judgment of the District Court.

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[2]The Honorable Paul A. Magnuson, United States District Judge for the District of Minnesota.

All the buildings at issue here were "substantially completed" between 1957 and 1970, and the District Court held that Concordia's claims were barred by operation of the ten-year repose provision of section 541.051. Concordia argues that the District Court improperly applied the statute of repose retroactively to bar its suit. We review the District Court's application and interpretation of state law de novo. See Salve Regina College v. Russell, 499 U.S. 225 (1991).

Section 541.051 was enacted in 1980 in substantially its present form, but with a fifteen-year accrual period for the repose provision.[3] The Minnesota Supreme Court held in 1986 that the two-year limitations period in section 541.051 had been applied retroactively—and improperly—to bar a "claim[] existing when it was enacted in 1980." Lovgren v. Peoples Elec. Co., 380 N.W.2d 791, 795 (Minn. 1986); see also Minn. Stat. § 645.21 (1992) ("No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature."). The court did not address retroactive application of the repose provision, however, and so Lovgren is not determinative of the outcome in this case.

The exact date when Concordia discovered (or reasonably should have discovered) the injury alleged in this case is not clear from the record before us, although the District Court indicated that the need for abatement was apparent to Concordia no later than 1984. It may be that Concordia's cause of action is barred by the general six-year tort statute of limitations in effect before enactment of section 541.051 in 1980. See supra n.3. It also is entirely possible that the cause of action is barred by the two-year statute of limitations found in the reenacted version of section 541.051, an issue the District Court specifically declined to decide. We need not remand for decision of these issues, however, as we conclude that the ten-year repose provision of section 541.051 was properly applied to this action.

In 1988, the Minnesota legislature enacted the following law (which was never codified, apparently because it was effective for only

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[3]Prior section 541.051, enacted in 1965, was declared unconstitutional in 1977 on equal protection grounds. Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548, 555 (Minn. 1977). Under Minnesota law, the statute thus was void ab initio. Lovgren v. Peoples Elec. Co., 380 N.W.2d 791, 795 n.6 (Minn. 1986). In the absence of a statute of limitations specific to improvements to real property, the general six-year statute of limitations for tort actions applied. Id. at 795.

a very limited period of time after enactment):

> An action originally governed by Minnesota Statutes 1976, section 541.051, based on construction that was substantially completed between September 15, 1977, and January 1, 1978, may be brought according to Minnesota Statutes 1986, section 541.051 until January 1, 1989, **notwithstanding that the action would otherwise be barred by Minnesota Statutes 1986, section 541.051.**

1988 Minn. Laws ch. 547, § 1 (emphasis added). The legislative note accompanying the law indicated that the law was intended to "provid[e] relief for certain individuals denied a remedy due to the unconstitutionality of a statute of limitation relating to real property improvement." Id. ch. 547. There is no reason that construction substantially completed between September 15, 1977, and January 1, 1978, would be barred by new section 541.051 before January 1, 1989, if the repose period (ten years by 1986) did not begin running until enactment of section 541.051 in 1980. See Calder v. City of Crystal, 318 N.W.2d 838 (Minn. 1982) (applying section 541.051 to bar third-party action for contribution or indemnity where suit was filed in 1978 when no construction statute of limitations was in effect, and third parties were sought to be impleaded within weeks after the statute's effective date in 1980 but twenty-two years after substantial completion of the construction at issue). We believe the Minnesota legislature intended that the repose portion of section 541.051 would apply to bar actions such as this one.[4]

Concordia also argues that the statute, which applies "[e]xcept where fraud is involved," was tolled as to at least some of the defendants because they committed fraud. The District Court did not consider this argument, however, because Concordia failed to raise the issue in response to defendants' motion for summary judgment. The District Court declined to hear Concordia's evidence of alleged fraud offered after summary judgment had been granted and denied

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[4]Although they have not addressed the retroactivity of the statute of repose per se, courts applying Minnesota law have applied section 541.051 to bar actions that would have gone forward had the repose period not started running before enactment of the statute in 1980. See, e.g., Sartori v. Harnischfeger Corp., 432 N.W.

Concordia's motion, made pursuant to Federal Rule of Civil Procedure 59(e), to alter or amend the judgment.

Concordia now contends that it was lulled into inaction because W.R. Grace allegedly had neither taken the position in its briefs in support of its motion for summary judgment that class action tolling was per se inapplicable, see discussion infra, at 9-12, nor had it relied upon the two-year statute of limitations in its argument. We fail to see how W.R. Grace's alleged actions excuse Concordia's failure to raise the fraud issue. The summary judgment motion sought to throw out Concordia's suit based on operation of section 541.051. Concordia cannot now claim that it was not on notice that evidence of fraud, which might toll the statute, would be relevant in response to a motion for judgment based on operation of this statute of limitations and repose.

We review the District Court's denial of Concordia's motion to alter or amend for abuse of discretion. Hagerman v. Yukon Energy Corp., 839 F. 2d 407, 413 (8th Cir.) cert. denied, 488 U.S. 820 (1988). Finding none, we affirm.

"A motion to alter or amend judgment cannot be used to raise arguments which could have been raised prior to the issuance of judgment." Id. at 414. As the District Court correctly found, Concordia could not use a Rule 59(e) motion "to introduce new evidence that could have been adduced during pendency of the summary judgment motion. . . . Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time." Id. (citations to quoted cases omitted). The District Court did not abuse its broad discretion in concluding that Concordia was improperly attempting to

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2d 448 (Minn. 1988) (upholding constitutionality of section 541.051's repose provision as applied to bar an action where construction was completed in 1965 and injury occurred in 1984); Lourdes High Sch. of Rochester, Inc. v. Sheffield Brick & Tile Co., 870 F.2d 443 (8th Cir. 1989) (affirming district court's application of section 541.051's repose provision to bar action where construction was completed in 1959, injury was discovered in 1984, and suit was filed in 1985); cf. Independent Sch. Dist. No. 622 v. Keene Corp., 495 N.W.2d 244 (Minn. Ct. App.), review granted, No. C7-91-234 (Apr. 20, 1993) (declining to apply the 1986 version of section 541.051, and its ten-year repose provision, to construction completed in 1970, with injury discovered in 1981 and claim filed in 1983, but indicating the fifteen-year repose provision of 1980 in effect when suit was filed in 1983 would apply).

raise, via a motion to alter or amend, arguments that it could have raised in response to W.R. Grace's motion for summary judgment.

Concordia's remaining arguments concern the Minnesota revival statute for asbestos abatement actions. Concordia claims its action was begun before the statutory cut-off for such actions. In the event we conclude it was not, Concordia contends the statute was tolled by a pending class action suit.

Concordia filed its action in the District Court on June 29, 1990, but did not serve the defendants until after July 1, 1990. By the plain language of the Minnesota statute, actions to be revived under section 541.22 must be "begun before July 1, 1990." Under Minnesota law, which the parties agree is applicable here to determine when this action was "begun," see Walker v. Armco Steel Corp.., 446 U.S. 740, 753 (1980) (in a diversity action state service requirements that are an integral part of state statute of limitations apply in the absence of a conflicting federal rule), an action is not "commenced" until the defendants have been properly served. See Minn. R. Civ. P. 3.01 ("A civil action is commenced against each defendant . . . when the summons is served upon that defendant . . . . ") . The issue, then, is whether "begun" means something other than "commenced" so that the action was "begun" when filed, as Concordia contends, or whether the two words have the same meaning so that the action was "begun" only when defendants were served, W.R. Grace's position. Again we review the District Court's application of state law de novo. Salve Regina College, 499 U.S. 225.

Concordia argues that a lawsuit may have "begun" even though it has not "commenced." We agree that "commenced" is a term of art with respect to civil actions under Minnesota law and as such is defined by rule 3.01. Concordia, however, would have us ignore the ordinary meaning of "begun" as a synonym of "commenced," even though "begun" as pertinent here appears in a statute that specifies the time for beginning an otherwise barred civil action.

Concordia relies on a Minnesota eminent domain case, but we are not persuaded of its relevance here. See State by Spannaus v. Hopf, 323 N.W.2d 746 (Minn. 1982). In Hopf, the court held "that a proceeding in **eminent domain** begins with the filing of the petition. This conclusion is mandated by the language of the lis pendens statute . . . . Id. at 750 (emphasis added); see also Minn. R. Civ. P. 81.01(a)

& app. A (stating that eminent domain proceedings are excepted from Minnesota Rules of Civil Procedure when eminent domain statutes conflict with rules). The court did not declare this rule for all civil actions, but specifically determined this to be the legislative intent in eminent domain proceedings, since the lis pendens statute specifically indicated that eminent domain proceedings begin with the filing of the petition. Hopf's holding concerning the beginning of a proceeding is limited to eminent domain cases.

Although the Minnesota legislature might have been clearer in its intent to use "begun" as having the same meaning as "commenced," we are satisfied that it so intended. We do not believe that the legislature's inconsistent terminology leads to the conclusion that "begun" and "commenced," synonymous in ordinary use, take on divergent meanings in legal use, absent an indication of such from the legislature or the Minnesota courts. Except for Hopf, which simply gives the lis pendens statute its plain meaning, Concordia has directed our attention to no Minnesota authority recognizing a distinction between "begun" and "commenced" in either legal or ordinary use, much less in regard to the start of a civil action.

Finally, Concordia claims the cutoff date specified in the asbestos revival statute is tolled by the filing of two class actions in another federal district court. The proposed classes in both cases were all colleges and universities in the United States and thus each class included Concordia as a putative plaintiff. A proposed class action filed in federal court in South Carolina in 1986 was dismissed in 1988 on jurisdictional grounds. On July 17, 1987, another proposed class action was filed in the same court. Plaintiff moved for class certification in December 1988, and the class was conditionally certified in September 1992. Central Wesleyan College v. W.R. Grace & Co., 143 F.R.D. 628 (D.S.C. 1992). (The certification issue is on interlocutory appeal to the F ourth Circuit, No. 92-2268, and oral argument was heard on April 1, 1993. A decision is pending.) Concordia claims it opted out of that action, however, by filing suit in 1990 against some of the same defendants named in the class action, alleging some of the same causes of action as in the class action for damages for asbestos abatement in campus buildings.

We make quick work of the argument that the commencement of the class actions in South Carolina within the Minnesota statutory

revival period somehow is the equivalent of Concordia filing its own action in Minnesota by the deadline. We agree with Concordia that section 541.22(2) requires neither that the action be begun in Minnesota nor that it be an individual action in order to be revived. But each suit filed is independent and each is subject to the revival date. Concordia presents no authority for the argument that the timely filing of the class actions, "standing alone, met the revival statute's 1990 deadline." Brief of Appellant at 11-12.[5] Although the filing of the class actions met the deadline for those actions, it did not meet the deadline for Concordia's individual action in Minnesota.

Concordia also contends that the filing of the class actions tolled the deadline indicated in the Minnesota revival statute so that Concordia's individual action was actually timely filed within that statute. The Supreme Court has held that, "at least where class action status has been denied solely because of failure to demonstrate [the numerosity required by Federal Rule of Civil Procedure 23], the commencement of the original class suit tolls the running of the statute [of limitations] for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 552-53 (1974). The Court later expanded the availability of American Pipe class action tolling of the statute of limitations to the benefit of those other than intervenors, declaring that "class members may choose to file their own suits or to intervene" after class certification has been denied. Crown, Cork & Seal Co. v. Parker,462 U.S. 345, 354 (1983).[6]

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[5]This argument assumes Concordia's participation in the class actions was not barred by the two-year limitations period in section 541.051, a question we do not decide.

[6]We note that there is a subissue here that we do not decide because our holding makes it unnecessary that we do so. There is some question whether a putative class member can enjoy the benefits of tolling merely by opting out, even though the class action is still pending. The Supreme Court in dicta has intimated as much, even though that is not the language of American Pipe or Crown, Cork & Seal. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 n.13 (1974) ("Petitioner also argues that class members will not opt out because the statute of limitations has long since run out on the claims of all class members other than petitioner (suit having been filed more than eight years before this opinion]. . This contention is

The District Court held that class action tolling was inapplicable to the Minnesota revival statute here at issue, relying on Singer v. Eli Lilly & Co., 549 N.Y.S.2d 654 (N.Y. App. Div. 1990). In Singer, the court construed a toxic tort revival statute that provided a one-year revival period for bringing actions for injuries due to latent effects of exposure to five toxic substances. The statute at issue in Singer revived an action "provided such action is commenced" within the statutory period. Id. at 656. The court concluded that the one year period was a "condition precedent, rather than a statute of limitation . . . . Thus, compliance with the time period is a substantive element of the cause of action." Id. Contra Clark v. Abbott Labs., 553 N.Y.S.2d 929, 933-34 (N.Y. App. Div. 1990).

The statute here is different from the New York statute. First, the Minnesota legislature specifically referred to section 541.22 as a statute of limitations, although its effect is to provide a window of time within which otherwise time-barred actions may be begun. Minn. Stat. § 541.22(1) ("[b]y enactment of this statute of limitations"). Further, there is no provisional language requiring an action to be begun in order to be revived. See id. § 541.22(2) (stating that an action "revived or extended under this subdivision may be begun before July 1, 1990"). Thus, because of the differences between the New York statute and the Minnesota statute, the Singer analysis is not entirely apposite here.

Based on our reading of the Minnesota revival statute, we disagree with W.R. Grace's argument that filing suit is a condition precedent to revival. Nevertheless, we agree with the District Court that section 541.22 was not tolled by the filing of the class actions. The Minnesota asbestos revival statute postulates that it is "in the interest of the general public, particularly those persons who may bring claims regarding materials containing asbestos **and those against whom the claims may be brought,** to set **a specific date** by which building

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disposed of by our recent decision in American Pipe . . . which established that commencement of a class action tolls the applicable statute of limitations as to all members of the class."). But see Pulley v. Burlington N., Inc., 568 F. Supp. 1177, 1179 (D. Minn. 1983) ("[W]hile a class action tolls the statute of limitations for all claims within the class action, it does not toll the limitations period for individual actions brought by members of the class while the class still exists.").

owners must bring a cause of action." Minn. Stat. § 541.22(1) (emphasis added). We believe it is clear that, by setting a "specific date" by which otherwise time-barred asbestos cases could be begun, the Minnesota legislature created a substantive right (to bring a cause of action otherwise barred) rather than a procedural bar. Giving the language of the revival statute its ordinary meaning, we conclude that the date within the revival statute that is the deadline for bringing the revived suit (July 1, 1990) must be strictly observed and is not subject to equitable tolling. We have not been directed to any authority, and we have not found any, that persuades us the Minnesota legislature intended a contrary result.

The judgment of the District Court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.2

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Concordia College Corporation, a non-profit organization,

Civil File No. 3-90-0435

Plaintiff,

v.

MEMORANDUM AND ORDER

W. R. Grace & Co and W.R. Grace & Co.-Conn.; Armstrong World Industries; Carey-Canada, Inc.; Asbestospray Corporation; Basic, Inc.; The Celotex Corporation; Dana Corporation; Asbestos Products Manufacturing Corp.; H & A Construction Corporation; Keene Corporation; National Gypsum Company; Pfizer, Inc.; J. W. Roberts,, Ltd.; Turner Asbestos Fibres, Ltd.; Turner & Newall PLC; and United States Gypsum Company,

Defendants.

I.. INTRODUCTION

This motion is before the court upon a joint motion for summary judgment by defendants W. R. Grace & Co. -Conn. , Basic, Inc., Keene Corporation, Pfizer Inc., and United States Gypsum Company. Defendants argue that the applicable statutes of limitation bar plaintiff's claims. For the following reasons, the court grants the defendants' motion.

II. FACTS

Concordia College Corporation constructed campus buildings between 1957 and 1970, allegedly using asbestos-containing materials. Concordia officials at the highest level discovered the presence of the asbestos by 1984. On or about August 1, 1986, Concordia joined a

nationwide federal class action against the defendants in this case to recover the costs of abating asbestos-containing materials, allegedly present in its buildings. Clemson v. W.R. Grace, Civ. File No. 2:86-2055-2, (D.S.C. 1986). On July 15, 1988, the South Carolina District Court dismissed the class action on jurisdictional grounds.

On or about July 17, 1987, Concordia joined another class action with the same parties and issues. Central Wesleyan College v. W.R. Grace, Civ. File No. 2:87-1860-2, (D.S.C. 1987). Concordia opted out of the Wesleyan College class action by filing this action on June 29, 1990. The defendants were not served until July 24, 1990.

III. DISCUSSION

A court shall render summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c) (1987). In their original brief in support of the motion to dismiss the defendants argued that the ten-year limitation in the Minnesota statute of repose barred Concordia's claims. Minnesota Statute § 541.051 provides:

> Subdivision 1. (a) Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of the injury, shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction or the improvement to real property or against the owner of the real property more than two years after discovery of the injury or, in the case of an action for contribution or indemnity, accrual of the cause of action, nor, in any event shall such a cause of action accrue more than ten years after substantial completion of the construction. Date of substantial completion shall be determined by the date when construction is sufficiently completed so that the owner or the owner's representative can

> occupy or use the improvement for the intended purpose.

Minn. Stat. § 541.051 (emphasis added). In this case, the parties agree that Concordia substantially completed construction in 1970. Concordia did not join the Clemson class action until 1986.

In Independent School District No. 197 v. W.R. Grace & Co., 752 F.Supp. 286 (D. Minn. 1990), Judge MacLaughlin held that a showing of fraudulent concealment could toll the statute of repose. 752 F.Supp. at 291. Concordia never raised a fraudulent concealment argument in relation to the statute of repose and never produced any evidence showing fraud. Concordia's claims are, therefore, barred by the ten-year statute of repose.

Concordia argues that Minnesota Statute § 541.22 revives its claim.

> Subdivision 2 of the revival statute provides:
>
> **Subd. 2. Limitation on certain asbestos actions.** Notwithstanding any other law to the contrary, an action against a manufacturer or supplier of asbestos or material containing asbestos to recover for (1) removal of asbestos or material containing asbestos from a building, (2) other measures taken to locate, correct, or ameliorate any problem related to asbestos in a building, or (3) reimbursement for removal, correction, or amelioration of an asbestos problem that would otherwise be barred before July 1, 1990, as a result of expiration of the applicable period of limitation, is revived or extended. An asbestos action revived or extended under this subdivision may be begun before July 1, 1990.

Minn. Stat. § 541.22.

Federal courts must follow state substantive law to determine when an action is commenced for the purpose of tolling a state statute of limitations. Walker v. Armco Steel, 446 U.S. 470,752753 (1988). Minnesota Rule of Civil Procedure 3 requires that the summons be served upon the defendant or a proper official for service before the action is commenced. Minn. Stat. § 3.01.

Concordia argues that the revival statute used "begun" instead

of "commenced." The court notes, however, that throughout the Minnesota Statutes, the Minnesota Legislature uses the words "begin" and "commence" interchangeably. The court finds no significance to the Legislature's choice of words in the revival statute. Although Concordia filed its action on June 29, 1990, it failed to serve the defendants before July 1, 1990. The revival statute does not, therefore, extend Concordia's action.

Concordia further argues that the class action tolls the revival statute. The July 1, 1990 deadline is, however, a condition precedent to bringing suit under Minnesota Statute § 541.22. A class action does not, therefore, toll the July 1, 1990 limitation. See, Singer v. Eli Lilly, N.Y.L.J. 9/7/88, aff'd 549 N.Y.S. 2d 654 (1st Dept. 1990). Concordia raises no additional issues of material fact for trial. The defendants are entitled to judgment as a matter of law.

Accordingly, **IT IS ORDERED** that:

The defendants' motion for summary judgment is **GRANTED.** The complaint is **DISMISSED.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 16, 1991.

Paul A. Magnuson
United States District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Concordia College Corporation, a non-profit organization,

Plaintiff,

v.

Civil File No. 3-90-0435

MEMORANDUM AND ORDER

W. R. Grace & Co., and W.R. Grace & Co.-Conn.; Armstrong World Industries; Carey-Canada, Inc.; Asbestospray Corporation; Basic, Inc.; The Celotex Corporation; Dana Corporation; Asbestos Products Manufacturing Corp.; H & A Construction Corporation; Keene Corporation; National Gypsum Company; Pfizer, Inc.; J. W. Roberts, Ltd.; Turner Asbestos Fibres, Ltd.; Turner & Newall PLC; and United States Gypsum Company,

Defendants.

This matter is before the court upon Concordia's motion for reconsideration of this court's order dated November 18, 1991, granting the defendants' motion for summary judgment. For the following reasons, the court denies Concordia's motion.

Federal Rule of Civil Procedure 59(e) allows a court to reconsider a judgment. Fed. R. Civ. P. 59 (e) . Three major grounds justify reconsideration of a judgment: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. All Hawaii Tours v. Polynesian Cultural Center, 116 F.R.D. 645,649 (D.Hawaii 1987)

(citing Kern-Tulare Water Dist. v. City of Bakersfield, 634 F.Supp. 656,665 (E.D.Cal. 1986) and Major v. Benton, 647 F.2d 110,112 (10th Cir. 1981)).

At the summary judgment hearing on September 27, 1991, defendants argued that the repose statute barred the plaintiff's action. Concordia countered by arguing that the class action tolled the statute of repose. Concordia mentioned that if the defendants had argued that the class action tolling was per se inapplicable, he would have advanced a fraudulent concealment argument. Concordia offered no evidence, however, to support this fraudulent concealment argument.

In a letter submitted to the court on October 4, 1991, Concordia reiterated its position that the class action tolled the statute of limitations and requested the opportunity to submit evidence of the defendants' fraudulent concealment if the court considered the statute of limitations. The statute of limitations issue was clearly before the court, but Concordia did not submit any evidence to support a finding of fraudulent concealment. On November 18, 1991, the court issued its opinion holding that the statute of repose barred Concordia's claim. Concordia now offers evidence of fraudulent concealment.

To support a motion for reconsideration of a grant of summary judgment based upon newly discovered evidence, the movant must show that the evidence was newly discovered or unknown to it until after the hearing. All Hawaii Tours, 116 F.R.D. at 649. if the proffered evidence was available before the disposition of the motion for summary judgment, then as a matter of law, the movant is not entitled to reconsideration based upon that evidence. Id.

Concordia does not contend that the offered evidence of fraudulent concealment was not available before the disposition of the summary judgment motion. Concordia is not, therefore, entitled to reconsideration of the court's November 18, 1991 order.

Concordia further argues for reconsideration on the following grounds: (1) that Minn. Stat. § 541.051 cannot be applied retroactively; (2) that the order did not consider the impact of State by Spannaus v. Hopf, 323 N.W.2d 746 (Minn. 1982) on the issue of whether Minn. Stat. § 541.22 requires service on the defendants to "begin" a revived action; and (3) that the order did not consider whether the 1987 and 1988 class action satisfy Minn. Stat. § 541.22's condition precedent

that the action be begun before July 1, 1990. Whether or not directly addressed in the order, the court's judgment necessarily concludes that § 541.051 was not applied retroactively, that Minn. Stat. § 541.22 required service on the defendants,, and that the class actions did not toll the limitation in Minn. Stat. § 541.22. Concordia does not argue that these conclusions constitute clear error or must be amended to avoid manifest injustice.

Accordingly, IT IS ORDERED that:

Concordia's motion for reconsideration under Federal Rule of Civil Procedure 59(e) is DENIED.

Dated: January 6, 1992.

Paul A. Magnuson
United States District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Concordia College Corporation,

Plaintiff,

v. Civil 3-90-435

W. R. Grace & Co., et al

Defendants.

The above-entitled matter came on for hearing before the Honorable Paul A. Magnuson, a Judge of the above-named Court, on Friday, September 27, 1991, at St. Paul, Minnesota, commencing at 2:05 p.m.

BRUCE R. TIFFANY
UNITED STATES DISTRICT COURT
784 Federal Building
316 North Robert Street
St. Paul, Minnesota 55101

612 291-7835

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I would like to make a couple of introductory points just to clarify our position.

Number one, we don't agree that the facts are undisputed. What we say is that the Defendants have not presented facts, even if we assume them to be true, even under the facts that they allege, they are not entitled to the relief. And we say that in light of what we understand the law is in Minnesota, the law under the revival statute, the law of tolling under the 197 decision, Judge MacLaughlin's decision, and the law of the statute of limitations, also as set forth in the 197 decision. If somehow we are misconstruing the law, and hopefully I will convince Your Honor that we're not, that somehow

some fact is involved that we don't see, we certainly would like to respond to that. Again, I don't believe that's the issue. I don't believe we need to get into factual issues.

The other preliminary point I want to make is: I don't believe, and certainly when we filed our brief we did not believe, as we pointed out I believe in a footnote, that the Defendants raise a statute of limitations ground in the motion before Your Honor.

As I read the first brief, to which we responded, the Defendants certainly raised the revival issue and certainly raised the statute of repose that our case should be kicked out according to the Defendants, because it's barred by the ten-year statute of repose and that we cannot be afforded the relief

THE COURT: Okay. Thank you very much, Mr. Plunkett. You came along ways. That's fine.

MR. SPEIGHTS: I won't repeat myself. But Counsel has now said that Clemson's a nullity, it picked up on the courts and good lawyering there. We, of course, don't believe that. We think we have to toll both. But if Clemson is a nullity, then there's no piggyback because then he has to concede that Central Wesleyan tolls. And Central Wesleyan would toll from July 17, 1987-on. And Central Wesleyan, we think, would toll not only all the statutes of limitations but also protect us under the revival statute.

And the best way to illustrate that point, Your Honor, is he wants to send me back to South Carolina.

What happens down in South Carolina, now, if we just said, okay, we'll go back, we'll be part of this putative class action, Concordia, and six months from now Judge Blatt denies certification, and says, I'm not going to maintain a class action here; all you colleges can go back to Minnesota, and North Dakota, et cetera?

We'd be right back here.

Would we be any better off, be any worse off?

We would be right back here saying that we were told because of August 1, 1986 there was a class action pending down there and we shouldn't be deprived of the revival statute when we were part of this putative class action, proceeding in good

faith, down in South Carolina. And that's the reason for the tolling.

THE COURT: Okay. Thank you very much.

MS. WALLACE: Your Honor?

THE COURT: Yes?

MS. WALLACE: Before we leave, if the individual defendants can have an opportunity to speak up?

THE COURT: Sure.

MS. WALLACE: During Counsel's initial argument, he makes some indication that Defendants concede that tolling applies. And I just want to make sure that the record was clear that at least as to U.S. Gypsum there is no such concession. I think the arguments have been presented to the Court and lay down very clearly why tolling wouldn't apply, assuming argumentatively that it might in some instance.

The second point I'd like to make is perhaps somewhat in response to the Court's question that you've raised a couple of times in terms of the jurisdictional question as it relates to Clemson. Without conceding that there's any tolling, even if you look at Wesleyan and this Plaintiff came in here and filed their lawsuit with this Court the end of June; at that moment in time, they manifested their intention to not avail themselves of any tolling that they could possibly get from the Wesleyan case We would take the position that with that manifested intention, they cannot have their cake and eat it, too. They failed to

minute.

Anybody want a bite of the apple?

MR. SPEIGHTS: I must respond to her just one second, Your Honor.

THE COURT: Go ahead. Sure.

MR. SPEIGHTS: If the Defendants had taken that position in their brief, I certainly would have put forward our fraudulent concealment argument, which I think is very strong and especially with our good friends at U.S. Gypsum. But they assumed, at least in the briefs, that tolling would apply. And if Your Honor does want to look at that, and if that Hamilton case is presented, I'll present the four

or five other cases. There's Hamilton over here and there are four or five over here.

Thank you.

THE COURT: Okay. Counsel, as to this whole case business of citations as of today, put it this way: I'm going to hold this record open for one week, in other words, a week from today, and then I'll close it.

In that week, cases that were specifically addressed today may be addressed by Counsel on either side of the table.

What I'm really talking about here, Mr. Speights, is to give you opportunity, particularly to those comments made by My. Plunkett today to some new citations, by letter comment, permit you to respond to that. And if you say Miss Wallace wants to provide this Hamilton County case to me, please do so. You say there are four or five other cases. Go ahead and run a copy, or a West check or something on them. And at that point, a week from today, the paper has grown high enough, we'll stop it.

With that, unless there's something else, why, have a good weekend, and we'll let you know.

MR. HERR: Thank you, Your Honor.

MR. PLUNKETT: Thank you, Your Honor.

(The hearing concluded at 3:13 p.m.)

REPORTER'S CERTIFICATE

I, Bruce R. Tiffany, do hereby, certify that the foregoing is a true and correct transcript of my original Stenographic notes taken in the aforementioned matter.

_____

Bruce R. Tiffany
United States Court Reporter

(2)

Supreme Court, U.S.
FILED
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No. 93-897

In the Supreme Court of the United States

October Term, 1993

CONCORDIA COLLEGE CORPORATION,
Petitioner,

v.

W.R. GRACE & CO., W.R. GRACE & CO.-CONN., BASIC INCORPORATED, KEENE CORPORATION, PFIZER, INC. and the UNITED STATES GYPSUM COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
FROM THE EIGHTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI OF RESPONDENTS W.R. GRACE & CO., W.R. GRACE & CO.-CONN., BASIC, INC., AND PFIZER INC

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QUESTIONS PRESENTED

1. Whether Petitioner has identified special and important reasons, as required by Rule 10.1 of this Court's Rules, for the review of the decision of the United States Court of Appeals for the Eighth Circuit, in a case involving state law claims and in the absence of a conflict between the Court of Appeals' decision and the decision of another United States Court of Appeals or the Supreme Court?

2. Whether the intent of the Minnesota legislature in enacting the Minnesota "Revival Statute" for asbestos claims, Minn. Stat. § 541.22 (1988), as found by the Court of Appeals -- that the substantive right of revival thereby created ceased to exist unless asserted in a suit brought by a specific date and was not to be subject to equitable tolling beyond that date -- should be disregarded because of the American Pipe tolling doctrine applicable to procedural bars such as statutes of limitation?

3. Whether the commencement of class action(s) in federal district court in South Carolina in 1986 and 1987 (based on diversity jurisdiction and where no federal claims were presented) satisfies the July 1, 1990 deadline set forth in the Minnesota Revival Statute for the commencement of an asbestos case in Minnesota?

4. Whether the Court of Appeals applied the correct standard of review to the District Court's denial of Petitioner's motion to amend or alter judgment under Rule 59(e)?

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JURISDICTIONAL STATEMENT

Respondents received the Petition for Writ of Certiorari on December 6, 1993. The Respondents filing this Brief in Opposition are W.R. Grace & Co., W.R. Grace & Co.-Conn., Basic, Inc. and Pfizer Inc.[1]

STATUTES INVOLVED IN THE CASE

The full text of Minnesota Statutes Section 541.22, the Minnesota revival statute for asbestos claims ("Revival Statute"), is as follows:

541.22. Limitation on asbestos claims

Subdivision 1. Findings and purpose. The legislature finds that it is in the interest of the general public, *particularly those persons who may bring claims regarding materials containing asbestos and those against whom the claims may be brought*, to set *a specific date* by which building owners *must* bring a cause of action for removal or other abatement costs associated with the presence of asbestos in their building. By enactment of this statute of limitations the legislature does not imply that suits would otherwise be barred by an existing limitations period.

Subdivision 2. Limitation on certain asbestos actions. Notwithstanding any other law to the contrary, an action to recover for (1) removal of asbestos or materials containing asbestos from a building, (2) other measures taken to locate, correct, or ameliorate any problem related

[1]Respondents United States Gypsum Company and Keene Corporation have previously filed with this Court separate letters waiving their right to file an opposition brief.

to asbestos in a building, or (3) reimbursement for removal, correction, or amelioration of an asbestos problem that would otherwise be barred before July 1, 1990, as a result of expiration of the applicable period of limitation, is revived or extended. An asbestos action revived or extended under this subdivision may be begun before July 1, 1990.

(Emphasis added.)

Minnesota Rule of Civil Procedure 3.01 provides in part:

> A civil action is commenced against each defendant:
>
> (a) when the summons is served upon that defendant, ...

STATEMENT OF THE CASE

Petitioner Concordia College Corporation ("Concordia") filed this diversity action to recover the costs of abating asbestos-containing materials in campus buildings under Minnesota law on June 29, 1990. All of the defendants in the suit were served by July 24, 1990, but none were served before July 1, 1990. [A-4].

The campus buildings in question were substantially completed between 1957 and 1970. [A-5]. Respondents moved for summary judgment under Minn. Stat. § 541.051.1(a) (1988) (the "Statute of Repose"), Minnesota's ten-year statute of repose for real property improvement claims, establishing that Concordia's cause of action under Minnesota law had been extinguished, at the latest, in 1980, ten years after the substantial completion of the campus buildings with asbestos-containing materials ("ACM"). Concordia opposed the motion on the grounds that the Statute of Repose had been tolled during the pendency of two federal

class actions pending in South Carolina[2] and, in addition, that its ACM claims under Minnesota law had been revived by enactment of the Revival Statute in 1988. The parties disputed whether Concordia was entitled to claim the benefit of the Revival Statute since Concordia had filed, but not served, as required by the Minnesota Rules of Civil Procedure, the summons and complaint upon Respondents before July 1, 1990. Respondents argued that the action did not begin until service had been effected under Minnesota law.

Although Concordia argued that the Statute of Repose had been tolled by the pendency of the South Carolina class actions, no evidence to support a finding of fraudulent concealment was submitted to the District Court prior to November 18, 1991, when the Court issued its opinion granting summary judgment to Respondents. [A-18].

In granting summary judgment, the District Court held that Concordia's suit was barred by the Statute of Repose and that Concordia was not entitled to proceed under the Revival Statute because its action was not begun before July 1, 1990, as the statute required. [A-3]. The Court subsequently denied Concordia's motion to alter or amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure, noting that the Rule would justify reconsideration of the judgment on three major grounds: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice, relying upon All Hawaii Tours Corp. v. Polynesian Cultural Center, 116 F.R.D. 645, 649 (D. Haw. 1987), rev'd on other grounds, 855 F.2d 860 (9th Cir. 1988)(citing Kern-Tulare Water Dist. v. City of Bakersfield, 634 F. Supp. 656, 665 (E.D. Cal. 1986),

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[2]In its October 4, 1991 post-argument letter brief to the Court, Concordia changed its tolling theory to the present one, claiming that the Revival Statute, not the ten-year Statute of Repose, was tolled by the class actions.

aff'd in part and rev'd in part, 828 F.2d 514 (9th Cir. 1987), cert. denied, 486 U.S. 1015 (1988) and Major v. Benton, 647 F.2d 110, 112 (10th Cir. 1981)). [A-17]. The Court found, inter alia, that Concordia had not contended that the offered evidence of fraudulent concealment was *not* available before disposition of the summary judgment motion and, therefore, was not entitled to reconsideration of the court's initial summary judgment and order. [A-18].[3]

The United States Court of Appeals for the Eighth Circuit affirmed the District Court's grant of summary judgment, on the grounds that Concordia's suit was barred by the ten-year Statute of Repose and was not revived under the Revival Statute because it was not "begun before July 1, 1990" under Minnesota law.

The Court of Appeals held that Concordia had presented no authority for the argument that the filing of class actions, "standing alone," met the July 1, 1990 deadline.[4] "Each suit filed is independent and each is subject to the revival date." [A-8]. While the filing of the class actions met the deadline for those particular actions, it did not meet the deadline for Concordia's individual action in Minnesota. [A-8, 9]. The Court further upheld the District Court's holding that the

---

[3]Concordia concedes that it did not present any evidentiary materials to the District Court relating to claims of fraudulent concealment against Respondents Basic, Inc. or Pfizer Inc. [See Petition at 4 n.3].

[4]The case of Clemson University v. W.R. Grace & Co., Civil No. 2:86-2055-2 (D.S.C.) ("Clemson"), was filed on August 1, 1986. During the time Clemson was active, plaintiff's counsel [also counsel for Concordia in this suit] filed a second action on July 17, 1987 asserting the same claims entitled Central Wesleyan College v. W.R. Grace & Co., 143 F.R.D. 628 (D.S.C. 1992), aff'd, 6 F.3d 177 (4th Cir. Sept. 24, 1993)("Central Wesleyan") [Petition at 2], which has now been conditionally certified. By order filed July 18, 1988, the district court dismissed the Clemson action for lack of subject matter jurisdiction.

Revival Statute had not been tolled by the filing of the class actions:

> [B]y setting a 'specific date' by which otherwise time-barred asbestos cases could be begun, the Minnesota legislature created a substantive right (to bring a cause of action otherwise barred) rather than a procedural bar. Giving the language of the revival statute its ordinary meaning, we conclude that the date within the revival statute that is the deadline for bringing the revived suit (July 1, 1990) must be strictly observed and is not subject to equitable tolling. We have not been directed to any authority, and we have not found any, that persuades us the Minnesota legislature intended a contrary result.

[A-10, 12].

The Court of Appeals also affirmed the District Court's denial of Concordia's motion to alter or amend the judgment. [A-4]. In rejecting Concordia's explanation as to why it had not raised the issue of fraudulent concealment, the Court stated:

> Concordia now contends that it was lulled into inaction because [Appellees] had neither taken the position it its briefs in support of its motion for summary judgment that class action tolling was per se inapplicable, . . . nor had it relied upon the two-year statute of limitations in its argument. We fail to see how [Appellees'] alleged actions excuse Concordia's failure to raise the fraud issue. The summary judgment motion sought to throw out Concordia's suit based on operation of section 541.051. Concordia cannot now claim that it was not on notice that evidence of fraud, which might toll the statute,

would be relevant in response to a motion for judgment based on operation of this statute of limitations and repose.

[A-7].

The Court of Appeals held that a motion to alter or amend judgment should not be used to raise arguments which could have been raised prior to the issuance of judgment, nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time. See Hagerman v. Yukon Energy Corp., 839 F.2d 407, 413 (8th Cir.), cert. denied, 488 U.S. 820 (1988). [A-7].

SUMMARY OF THE ARGUMENT

The Petition fails to present questions warranting this Court's attention. This action concerns principally the construction of Minnesota laws. Further, no direct conflict exists between the Court of Appeals' decision and the decisions of any other Court of Appeals or of this Court.

Concordia's property damage claims against Respondents were extinguished no later than 1980 by application of the Minnesota ten-year Statute of Repose, Minn. Stat. § 541.051 (1988). The Minnesota Revival Statute, Minn. Stat. § 541.22 (1988), revived or extended asbestos claims otherwise barred for a limited period of time so long as the action was begun before July 1, 1990. The statute created a new, substantive right under state law with its own built-in condition. Expiration of the July 1 deadline did not merely suspend enforcement of the right of recovery as a statute of limitations might; rather, as the Court of Appeals indicated, it destroyed the right itself. Concordia did not satisfy the statutory deadline because service of the summons and complaint was not made upon the Respondents, as state law requires, until after July 1, 1990.

Concordia argues that the federal courts should disregard the contours of this state-created right because of "federal policy." The reasons it offers do not, however, hold water.

The Court of Appeals applied the correct legal standard in holding that the District Court acted within its discretion in denying Concordia's Rule 59(e) motion on the basis that Concordia sought to introduce new evidence that could have been presented during the pendency of the summary judgment motion.

REASONS FOR DENYING THE WRIT

I. Concordia Has Failed To Demonstrate Specific And Important Reasons For This Court's Discretionary Review Of The Court Of Appeals' Decision.

This Court uses its certiorari jurisdiction to resolve conflicts among the federal Courts of Appeals and the state courts concerning the meaning of federal law. See Braxton v. United States, 111 S. Ct. 1854, 1857 (1991). The Petition presents issues of Minnesota law. Certiorari is not ordinarily granted to review federal court decisions construing state laws. Commissioner v. Bosch, 387 U.S. 456, 462 (1969)("The issue presents solely a question of state law and we ordinarily accept the determination of local law by the [United States] Court of Appeals") (citing Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 534 (1949); Appalachian Power Co. v. American Inst. of Certified Public Accountants, 80 S. Ct. 16, 18 (1959) (the Court ordinarily accepts the determination of state laws found by the Court of Appeals, particularly when the same finding is made by the District Court)). While the Court of Appeals may have been required to review a district court's interpretation of state law de novo, the Supreme Court is not obligated to grant certiorari

to correct misinterpretations of state law. See Salve Regina College v. Russell, 499 U.S. 225, 235 n.3 (1991); Chardon v. Fumero Soto, 462 U.S. 650, 654 n.5 (1983). Moreover, the Petition fails to demonstrate any conflict among the Courts of Appeals regarding the application of Federal Rule of Civil Procedure 59(e), or to establish a direct conflict between the Court of Appeals' decision and decisions of this Court.

Concordia's position is that the July 1, 1990 deadline in the Minnesota Revival Statute should have been tolled, by virtue of the commencement of class actions in South Carolina. The central holding of the Court of Appeals' decision was that the Revival Statute created a new, substantive right (rather than simply removing a procedural bar) under Minnesota state law, i.e., the right to bring a cause of action otherwise barred for a limited period of time and by a date certain, and that the statutory scheme did not permit the statutory deadline to be tolled for *any* equitable reason, including, but not limited to, the filing of class action litigation. [A-12]. Integral to the Court of Appeals' analysis of the Revival Statute was subdivision 1 of the statute, wherein the legislature cited the interests of both plaintiffs and defendants in setting a date certain for the bringing of otherwise stale actions under the Revival Statute. Giving the statutory language its ordinary meaning, the Court of Appeals concluded that tolling the deadline would be inconsistent with the legislature's purpose in setting a date certain by which new claims under the statute must be brought, and that the statutory deadline of July 1, 1990 must be "strictly observed." [A-12]. General tolling doctrines do not apply where a right of action is created by a statute which also places a limit on the existence of the right. See 54 C.J.S. § 85, p. 121 (1987); Weaver v. Commonwealth, 387 Mass. 43, 438 N.E.2d 831 (Mass. 1982).

The Court of Appeals' analysis does not conflict with this Court's analysis, in American Pipe, supra, 414 U.S. at 557-58,

of tolling limitations periods contained in federal statutes granting substantive rights. In that case, this Court held the federal limitations period was tolled only after a thorough analysis confirming that tolling the period *would* be consistent with the legislative intent in enacting the federal statute. This case presents issues of state law, not the federal issues presented in American Pipe. Accordingly, in the absence of any prior decisions that are at odds with the ruling in this case, Concordia has failed to demonstrate specific and important reasons to justify this Court's acceptance of certiorari.

II. The Federal Class Action Tolling Doctrine Does Not Apply To This Action.

The federal class action tolling doctrine provides that, after a class action is decertified, individual class members may intervene as parties plaintiff or file separate actions within the time remaining under the applicable statute of limitations at the time when the class action was commenced. See Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 346-47 (1983). Tolling only preserves those claims which existed at the time such tolling begins. See id.; United Airlines, Inc. v. McDonald, 432 U.S. 385, 392 (1977); Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 246 (3d Cir.), cert. denied, 421 U.S. 1011 (1975); Independent School Dist. No. 197 v. W.R. Grace & Co., 752 F. Supp. 286, 291 (D. Minn. 1990). If the limitation period had "already expired" prior to the filing of the class action, there can be no tolling to preserve individual claims. Barnesby v. E. F. Hutton & Co., 715 F. Supp. 1512, 1526-27, 1529 (M. D. Fla. 1989).

In this case, by virtue of the Statute of Repose, Concordia's state law claims were extinguished by 1980 -- ten years after substantial completion of the buildings, six years *before* the 1986 Clemson class action was commenced, and

seven years *before* the 1987 Central Wesleyan class action began.[5]

Minn. Stat. § 541.051 (1988) governs actions relating to improvements to real property. It contains both a ten-year statute of repose as well as a two-year statute of limitations.[6] The Court of Appeals applied the ten-year repose provision of Section 541.051(1)(a) which prevents any claim from arising more than ten years after substantial completion of construction. Any rights which Concordia may have had under Minnesota law were extinguished by 1980. When the class action(s) began, there was nothing to "toll."

Once Concordia chose to pursue its individual claim in Minnesota, it had available the benefits of the Revival Statute, but it was also bound by, and had to comply with, the substantive elements of the statute, including the July 1, 1990

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[5]Class actions cannot be daisy-chained for tolling purposes. See Andrews v. Orr, 851 F.2d 146, 149 (6th Cir. 1988); Salazar-Calderon v. Presidio Valley Farmers Ass'n, 765 F.2d 1334, 1351 (5th Cir. 1985), cert. denied, 475 U.S. 1035 (1986); Burns v. Ersek, 591 F. Supp. 837 (D. Minn. 1984); Bartlett v. Miller & Schneider Municipals, Inc., 355 N.W.2d 435, 440 (Minn. App. 1984).

[6]The repose portion of the statute provides that no action in contract, tort, or otherwise for damages arising out of a defective and unsafe condition in an improvement to real property can be brought more than ten years after construction is substantially completed. The ten-year period is extended to twelve years if discovery of the cause of action is made during the ninth or tenth year. Id. Fraudulent concealment may toll the statute of repose. See Wittmer v. Rueggemer, 419 N.W.2d 493, 497 (Minn. 1988).

Note that Concordia does not raise in its Petition any issue as to (a) the substantial completion of the subject buildings by 1970 at the latest; (b) the applicability or retroactivity of the ten-year statute of repose in Minn. Stat. § 541.051; or (c) whether its filing of the action prior to July 1, 1990 satisfies the Revival Statute requirement that the action be begun by that date. These arguments are therefore waived. See Radzanower v. Touche Ross & Co., 426 U.S. 148, 151 n.3 (1976); Sup. Ct. R. 14.1(c); 24.1(a).

deadline. Concordia's reference to the decision in Adams Public School District v. Asbestos Corp., 7 F.3d 717 (8th Cir. 1993) offers little to its argument. There, the Court acknowledged that the state legislature's passage of a revival statute made it unnecessary to "undertake such a delicate task" as balancing a "federal procedural interest with a state statute." 7 F.3d at 719.[7] Since Concordia did not timely commence its action as required, it received no protection from the Revival Statute.

III. This Is Not An Appropriate Case In Which To Override A State Legislature's Express Intent.

Concordia's second question for review boldly assumes some federal interest in a unified treatment of asbestos cases and suggests this interest should override the Minnesota legislature's purposes in setting a date-specific deadline for the bringing of revived lawsuits under the Minnesota Revival Statute. In diversity cases, the law of the forum, not federal considerations, applies to state statutes of limitations. See Specialty Restaurants Corp. v. Bucher, 967 F.2d 1179, 1181 (8th Cir. 1992); Lown v. Brimeyer, 956 F.2d 780, 781-82 (8th Cir.), cert. denied, 113 S.Ct. 176 (1992) (considerations of federal judicial efficiency do not justify equitable statute of limitations).

Contrary to Concordia's claim, there is no federal interest in a "unified treatment of asbestos cases" warranting

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[7]Similarly, the case of Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945) (Petition at 5) does not conflict with the Court of Appeals' decision. There, the Court declined to overrule the holding in Campbell v. Holt, 115 U.S. 620 (1885), that the Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. In fact, the Court noted that it did "not need to settle" arguments about whether limitation statutes create rights or are matters of remedy. Chase, 325 U.S. at 313.

preemption of state law. The federal courts have consistently declined to create federal law to replace state law in asbestos cases, requiring in all instances that liability be determined under state law exclusively. See Robertson v. Allied Signal, Inc., 914 F.2d 360, 366 (3d Cir. 1990); Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314, 1324-27 (5th Cir. 1985), cert. denied, 478 U.S. 1022 (1986); In re School Asbestos Litigation, 977 F.2d 764, 797 (3d Cir. 1992)(rejecting suggestion that courts could, in an effort to simplify proceedings in asbestos-in-building cases, apply "a hybrid or composite of state laws"). State tolling principles apply where state statutes of limitation apply, whether the lawsuit in question is pending in federal or state court. Chardon v. Fumero Soto, 462 U.S. 650, 660-61 (1983).[8]

Significant reasons exist to decline to apply a federal tolling doctrine in this case. Unlike American Pipe and Crown, Cork & Seal, Concordia, as well as the pending class plaintiffs, is asserting state law claims in a diversity action. Where the lawsuit has arisen under state law and no federal rights are at issue, a compelling case exists for total deference by a federal court in a diversity case to state limitations and tolling rules. This is particularly so when the state law contains an explicit and firm deadline for the commencement of litigation. See Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 465-66 (1975) (contrasting the federal

[8]While Concordia refers to a "federal interest in unified treatment of asbestos actions," citing the Judicial Panel's transfer under 28 U.S.C. § 1407 of personal injury cases, no similar transfer for consolidated treatment has occurred with respect to the far, far smaller number of asbestos property damage actions. Moreover, the 1991 report of the AD Hoc Committee appointed by Chief Judge Rhenquist which Concordia cites, rather than suggesting that current laws be twisted to achieve such purposes, recommended that Congress enact a new national legislative scheme, or new consolidation procedures, focused on asbestos personal injury cases.

limitations period and the significant underlying policy in favor of tolling under the federal antitrust statute with the state periods and policies governing limitations periods at issue); Board of Regents v. Tomanio, 446 U.S. 478, 485 (1980)(rejecting arguments for nationwide uniformity to find that the court was "obligated" to apply the New York tolling law, which did not permit tolling of the limitations period under the circumstances at issue, as well as the New York limitations period). State tolling provisions are considered to be an "integral" part of the state limitations period. 446 U.S. at 485, 488.

Both American Pipe and Crown, Cork concern the rights of class members asserting federal claims after a class action is decertified. The Court reasoned in those cases that, unless the class action tolled the applicable statute of limitation for putative class members, at least until the class was decertified, class members would be "induced" to protect themselves by filing protective motions to intervene or to file separate lawsuits in the event of decertification, thereby depriving Fed. R. Civ. P. 23 of the "efficiency and economy of litigation which is a principal purpose" of the class action procedure. Tomanio, supra, 414 U.S. at 553. None of these considerations apply to Concordia's situation since it pursued its separate recovery in Minnesota in lieu of remaining in a pending class action. Cf. Chardon v. Fumero Suto, supra, 462 U.S. at 662 (federal class action interests are vindicated so long as class members are given the time "remaining" under state law to intervene or begin their separate action after the class is decertified); Wachovia Bank & Trust Co. v. Nat'l Student Marketing Corp., 650 F.2d 342, 346 n.7 (D.C. Cir. 1980), cert. denied, 452 U.S. 954 (1981); Glater v. Eli Lilly & Co., 712 F.2d 735, 739 (1st Cir. 1983).

There is no "tension" between the Court of Appeals' decision and Crown, Cork and Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1973). The decision below deals only with

Concordia's independent suit in Minnesota. Crown, Cork and Eisen deal with the effect of a class action on claims asserted in that class action if certification were denied and the claimants had no choice but to proceed individually.

IV. In Ruling That Concordia's Lawsuit Did Not Meet The Minnesota Revival Statute's Deadline, The Court Of Appeals Applied Well-Settled Procedural Principles.

Concordia's third question presented for review asks the Court to decide whether the Court of Appeals improperly "discriminated" against it by requiring Concordia to satisfy the deadline separately. In the alternative to suspending the July 1, 1990 deadline, Concordia asserts that the 1987 filing in South Carolina of the Central Wesleyan class action met Concordia's July 1, 1990 deadline for filing its separate Minnesota lawsuit. [Petition at 7]. The Petition argues that the Court of Appeals held that while the Central Wesleyan class action in South Carolina somehow met the Minnesota Revival Statute deadline for those class members remaining in the Central Wesleyan action, Concordia "lost" this "protection" when it filed its separate action.

In holding that Concordia had *not* met the Minnesota deadline, the Court of Appeals did not create new class action principles discriminating between members who stay with the class action and those who strike out on their own. The Court merely applied the uncontroversial principles that each lawsuit filed is an independent action and that *each* lawsuit is subject to the statutory deadline. [A-10]. As the Court held, the Central Wesleyan lawsuit may have met the Revival Statute's deadline for the South Carolina action, but Concordia's separate action in Minnesota had its own, independent requirements, including satisfaction of the Revival Statute's deadline in its own right. Id.

This conclusion was premised on well-settled procedural principles. This Court recognizes that former class members must meet the separate limitations deadlines applicable to their separate actions. Crown, Cork, supra, 462 U.S. at 345 ("provided, of course, those [individual actions] are instituted within the time remaining on the limitations period"). Such deadlines are not mere technical obstacles to be circumvented if possible, but are binding rules of law. Board of Regents v. Tomanio, supra, 446 U.S. at 484. When Concordia decided to pursue its claims separately in Minnesota, it was not entitled to rest upon the class action filing date, but had to independently meet the Minnesota deadline.

This is the very risk that Concordia assumed by pursuing a separate recovery. The upside, of course, is that, in the event of victory, Concordia would not have to share the spoils of its victory with other class members. But it cannot have it both ways -- having all the benefits of pursuing separate recovery, but none of the risk occasioned by its failure to meet the requisite Minnesota deadline for bringing an action.

V. The Court Of Appeals Applied The Correct Standard Of Review To The District Court's Denial Of Concordia's Motion To Amend Or Alter Judgment Under Rule 59(E).

Ordinarily, when a federal district court's application of the Rules of Civil Procedure is affirmed by the Court of Appeals, as it is here, its decision will not be reviewed by this Court. Appalachian Power Co. v. American Inst. of Certified Public Accountants, supra, 80 S.Ct. at 18. Moreover, as Concordia acknowledges (Petition at 9), the Courts of Appeals uniformly recognize that the disposition of a Rule 59(e) motion is left to the sound discretion of the district court. Every circuit to have reviewed the results of a Rule 59(e) motion has concluded that the proper standard of review

is the abuse of discretion standard. E.g., Temkin v. Frederick County Commissioners, 945 F.2d 716 (4th Cir. 1991), cert. denied, 112 S.Ct. 1172 (1992); Mariani-Giron v. Acevedo-Ruiz, 945 F.2d 1 (1st Cir. 1991); Floyd v. Laws, 929 F.2d 1390 (9th Cir. 1991); Billups v. Methodist Hospital of Chicago, 922 F.2d 1300 (7th Cir. 1991); Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992). The Court of Appeals applied in this case the abuse of discretion standard to the District Court's decision in this case, following Hagerman v. Yukon Energy Corp., 839 F.2d 407, 413 (8th Cir.), cert. denied, 488 U.S. 820 (1988). Accord Jane Doe "A" v. Special School Dist. of St. Louis Cty., 901 F.2d 642, 647 (8th Cir. 1990); Wayzata Bank & Trust Co. v. A & B Farms, 855 F.2d 590, 595 (8th Cir. 1988). There is no perceived or actual conflict warranting review or consideration by this Court.[9]

Rule 59(e) does not contain explicit standards. It is for this reason that appellate courts, including the authorities Concordia relies upon, uniformly have ruled that the district courts have wide latitude in considering motions brought under the Rule. In the instant case, the District Court looked

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[9]Concordia's reliance upon Kort v. Western Surety Co., 705 F.2d 278 (8th Cir. 1983), is unavailing. The court in Kort discussed only procedural differences between a Rule 59 and a Rule 60 motion, not the propriety of the factors that support each motion. In any event, the more recent Hagerman decision lays to rest any notion concerning the Rule 59(e) factors to be considered.

The same is true for the case of General Office Products Corp. v. A.M. Cayen's Sons, Inc., 780 F.2d 1077 (1st Cir. 1986). There, the Court of Appeals upheld the district court's discretion. It did not, as Concordia contends, set forth any new rule of law or disagree with the prevailing rule. Accord Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 175 (5th Cir. 1990), cert. denied, 114 S. Ct. 171 (1993)("we cannot conclude that the District Court abused its discretion by reopening the case . . . .").

for guidance to the standards established in Rule 60(b) for the closely related motion for a new trial. Concordia does not offer alternative standards for a Rule 59(e) motion and, indeed, recognizes the close relationship between Rules 59(e) and 60(b) (Petition at 8), thereby implicitly acknowledging that the District Court's procedure was rational and not an abuse of discretion.

In all respects, the Petition fails to present any reasons or authority to demonstrate that the Court of Appeals erred in affirming the District Court's decision. To date, Concordia has yet to deliver a compelling argument to explain why it failed to present any evidence of fraudulent concealment at the time of summary judgment, notwithstanding that deadlines in both the Statute of Repose and the Revival Statute were directly at issue, and it has not disagreed that the facts available to it were indeed available at the time. As a consequence, in the unlikely event that the question presented for review merited attention, the instant case is not the vehicle for resolving the issue.

CONCLUSION

This action involves Concordia's attempt to assert exceptionally stale asbestos claims under the Minnesota Revival Statute, which provided a limited time, ending by a date certain -- July 1, 1990 -- for the assertion of otherwise stale claims. Concordia's state law claims were extinguished under the Statute of Repose ten years before this action began.

The Court of Appeals construed the Minnesota statutory scheme to conclude that, in enacting the Revival Statute, the legislature created a new, substantive right and did not intend to permit the statutory deadline to be tolled for any equitable reason. This Court does not ordinarily grant certiorari to review federal court decisions construing state laws. The specific holdings and underlying analyses of the Court of

Appeals are fully consistent with this Court's precedents and the other courts that have addressed the issues raised by the Petition. In short, no compelling reasons exist to apply a federal tolling doctrine to a diversity action involving state law claims.

Dated: January 4, 1994

Respectfully submitted,

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No. 93-897

In The

Supreme Court of the United States

October Term, 1993

CONCORDIA COLLEGE CORPORATION,

Petitioner,

v.

W.R. GRACE & CO., W.R. GRACE & CO.-CONN.; UNITED STATES GYPSUM COMPANY; KEENE CORPORATION; PFIZER, INC.; AND BASIC, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Eighth Circuit Court Of Appeals

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Petitioner ("Concordia College") offers this Reply to the Brief in Opposition ("Opposition") to emphasize what is undisputed, the crucial distinctions the Respondents fail to draw, and their resurrection of an argument they belatedly raised in the District Court and abandoned on appeal.

I. THE EIGHTH CIRCUIT'S DECISION ABOUT MINNESOTA LAW DOES NOT MERELY RAISE AN ISSUE OF STATE LAW BECAUSE IT AND A DECISION FROM THIS COURT DIRECTLY CONFLICT.

Respondents fail to recognize that the Eighth Circuit's decision that the Minnesota Revival Statute creates "substantive rights" [A. 12] does not merely raise an issue of state law. It directly conflicts with *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945). *Chase Securities* involved a Minnesota statute which, like the one at issue here, revived actions previously time-barred by another state statute if the revived action was brought by a specific date (one year from the revival statute's enactment). *Id.* at 308. While the Respondents correctly note that this Court declined to settle the split among the state courts on whether such statutes are procedural bars which effect only the remedy or whether they create substantive rights [Opposition at 11 n. 7], they ignore that this Court upheld the Minnesota Supreme Court's decision to follow this Court's earlier holding that such revival statutes do not violate due process because they do not create substantive rights. *Id.* at 309, *citing Campbell v. Holt*, 115 U.S. 620 (1885).

Respondents do not suggest that *Donaldson* was incorrectly decided or that the Minnesota Supreme Court's view has changed. This view – a revival statute which contains a specific deadline does not create substantive rights – directly conflicts with the decision below [A. 12]. This conflict warrants review.

II. IF THE REVIVAL STATUTE IS TOLLED, THE STATUTE REVIVES CONCORDIA'S PREVIOUSLY TIME-BARRED CLAIMS.

To side-step the *Donaldson* decision's holding that these revival statutes are not substantive (and are thus subject to tolling), Respondents say that tolling does not apply because the separate Repose Statute barred Concordia's claims before the class action was commenced [Opposition at 9-10]. The Petition did not ask this Court to decide whether the Repose Statute was tolled by the class action. It asked this Court to decide whether the *Central Wesleyan* filing tolled the Revival Statute's July 1, 1990 deadline [Petition at 5-7 (Questions 1-2)].[1] If it does, it is undisputed that the Revival Statute revives Concordia's claims which were previously barred by the ten-year Repose Statute. *Independent School District No. 197 v. W.R. Grace & Co.*, 752 F.Supp. 286, 296-298 (D.Minn. 1990).

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[1] Respondents imply that this issue is not preserved because Concordia did not raise it until after the hearing on the summary judgment motion [Opposition at 3 n. 2]. Concordia did raise Revival Statute tolling at the motion hearing [A. 21-22], and it was the issue decided by the District Court [A. 16] and the Eighth Circuit [A. 10-12]. The issue is preserved.

III. IF THE REVIVAL STATUTE IS NOT TOLLED AND THE CLASSES ARE EVER DECERTIFIED, NO MINNESOTA SCHOOL, COLLEGE OR UNIVERSITY CAN EVER BRING A TIMELY ACTION.

Respondents' emphasis on the Repose Statute's effect absent the Revival Statute's protection illustrates perfectly why certiorari should be granted. Absent the Revival Statute's tolling, it is undisputed that none of the multitude of Minnesota members in *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177 (4th Cir. 1993) or in *In re School Asbestos Litigation*, 789 F.2d 996, 1011 (3d Cir. 1986), *cert. denied*, 479 U.S. 852 & 915 (1986) can ever bring an individual action which survives the Repose bar [Petition 6-7].

While the Eighth Circuit held that the Revival Statute protects those in the class, its discrimination against individual actions ignores that individual actions may be forced on the present Minnesota class members involuntarily. *Central Wesleyan* and *In Re School Asbestos Litigation* were only conditionally certified, and both Circuits emphasized that the classes could and should be decertified if the District Courts later determine they are unmanageable. *Central Wesleyan*, 6 F.3d at 189-190; *In re School Asbestos Litigation*, 789 F.2d at 1011. If decertified, it is undisputed that the decision below deprives each and every Minnesota school, college, and university of the Revival Statute's protection against the Repose bar [Petition at 6-7]. The Revival Statute – a statute specifically designed to avoid the Repose bar – would be meaningless for them.

It is also undisputed that the Minnesota class members are not the only ones at stake. Class members from other states which have similar revival statutes now have every incentive to file separate actions within the deadlines set in their states' revival statutes [Petition at 7]. The clash between this needless multiplicity of actions and Rule 23 of the Federal Rules of Civil Procedure is precisely what the tolling rule was designed to avoid. *Crown, Cork & Seal Co. v. Parker,* 462 U.S. 345, 350-351 (1983).

IV. THIS COURT SHOULD GRANT CERTIORARI TO BALANCE THE INTEREST IN MAINTAINING FEDERAL CLASS ACTIONS AGAINST STATE LAW DISTINCTIONS BETWEEN "SUBSTANTIVE" AND "PROCEDURAL" DEADLINES.

It is undisputed that the Eighth Circuit failed to consider the federal interest in ensuring the efficiency and economy of diversity-based class actions or that a different panel of the Eighth Circuit more recently held that these interests "are sufficiently strong to justify tolling in a diversity case when the state law provides no relief." *Adams Public School District v. Asbestos Corp., LTD.,* 7 F.3d 717, 718-719 (8th Cir. 1993).

To argue otherwise, the Respondents offer the same arguments *Adams Public School District* rejected [Opposition at 11-13] and remarkably add that no federal interests exist because Concordia filed an independent action "in lieu of remaining in a pending class action" [*Id.* at 13]. The Respondents expressly abandoned this argument on

appeal,[2] and it is the very *per se* argument against tolling that caught Concordia by surprise in the District Court [A. 22-23]. Had the argument been raised timely, the record shows that Concordia would have presented its fraud evidence before judgment was rendered [A. 22].

In any event, the Respondents' argument [Opposition at 13] raises a subsidiary issue "fairly included" within Question 2 of the Petition. In balancing the federal interests identified in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974) against the state statute, are the federal interests just as strong when the separate action is filed before class certification is denied? While the District of Columbia and First Circuits apparently think not [Opposition at 13], *Adams Public School District* held that tolling applies even after a class is certified, *Adams Public School District*, 7 F.3d at 718 n. 1, and the Court below noted that this Court "intimated" as much in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n. 13 (1974) [A. 10]. This is the majority view.[3]

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[2] "The federal class action tolling rule provides that, *after opting out of a class action*, a plaintiff must file its individual action, or be barred by a statute of limitations, within the time remaining when the class action was commenced. For the limited purpose of this appeal, Appellees do not dispute this principle" [Appellees' Joint Brief at 12 (emphasis added)].

[3] Asbestos property damage decisions also include *May v. AC&S, Inc.*, 812 F.Supp. 934, 938-939 (E.D.Mo. 1993); *Independent School District No. 197 v. W.R. Grace & Co.*, 752 F.Supp. 286, 291 (D.Minn. 1990); *West Haven School District v. Owens-Corning Fiberglas Corp.*, 721 F.Supp. 1547, 1555 (D.Conn. 1988). Courts reaching the same conclusion in different contexts include *Tosti v. City of Los Angeles*, 754 F.2d 1485, 1488-89 (9th Cir. 1985); *Rochford v. Joyce*, 755 F.Supp. 1423, 1428 (N.D. Ill. 1990); *Sinclair*

Certiorari is necessary to review whether *Adams Public School District* correctly decided that the federal interests in maintaining diversity-based class actions justify tolling even though state law provides no relief. To resolve this issue, the Court may need to further resolve the Circuit split on whether tolling applies when the separate action is filed before class certification is denied.

V. THE DISTRICT COURT DECLINED TO REVIEW CONCORDIA'S FRAUD EVIDENCE BECAUSE IT BELIEVED IT LACKED THE DISCRETION TO DO SO.

The Respondents' Rule 59(e) arguments about the abuse of discretion standard fail to draw the crucial distinction between a District Court's exercise of discretion and the District Court's belief that it has no discretion to exercise. *See Cardinal Chemical v. Morton International, Inc.*, 508 U.S. ___, 124 L.Ed.2d 1, 18-19 (1993) (Scalia, J. concurring) (drawing same distinction).

The District Court did not exercise any discretion when it declined to review Concordia's fraud evidence. It instead held that the law prevented the Court from looking at the evidence: "if the proffered evidence was available before the disposition of the motion for summary judgment, then as a matter of law, the movant is not entitled to reconsideration based upon that evidence" [A. 18]. The appellate decision is just as clear – the Eighth

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Oil Corp. v. Atlantic Richfield, 720 F.Supp. 894, 912 and n. 48 (D.Utah 1989); *Bantolina v. Aloha Motors, Inc.*, 419 F.Supp. 1116, 1121-22 and n. 19 (D.Haw. 1976); *Agostine v. Sidon Corp.*, 69 F.R.D. 437, 448 n. 13 (C.D. Pa. 1976).

Circuit flatly held that a Rule 59(e) motion may not be used "to introduce new evidence that could have been adduced during pendency of the summary judgment motion . . . " [A. 7].

The Fifth and First Circuits, and an earlier decision from the Eighth Circuit, disagree and hold that District Courts do have the power to consider evidence first presented on a motion to alter or amend that could have been presented before judgment was rendered [Petition at 9].

The Respondents lastly suggest that this Circuit split need not be resolved because Concordia failed to present a "compelling" reason why it did not present its fraud evidence before judgment was rendered [Opposition at 17]. They do not, however, dispute that Concordia twice raised the fraud issue before judgment was rendered and specifically requested an opportunity to present the evidence before judgment was rendered [Petition at 3]. They further do not dispute that the District Court denied Concordia's request because the Court mistakenly believed another issue was clearly before the Court when it was not [Petition at 3 n. 1]. If this Court decides that District Courts have the power under Rule 59(e) to vacate summary judgments based on evidence not newly discovered, the determination of whether these circumstances justify doing so is for the District Court on remand.

Certiorari is warranted to resolve the Circuit split on the District Court's power under a motion to alter or amend.

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